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Supreme Court, U.S.
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No. 02-457

In The

Supreme Court of the United States

MORETON ROLLESTON, JR.,

Petitioner,

v.

The Estate of REBECCA WIGHT CHERRY SIMS,
JOHN RANDOLPH CHERRY, Executor,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals Of The State Of Georgia

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

The sole question presented for review is whether the trial court's denial of Petitioner's motion for a pretrial order served in open court on April 11, 2000, when the case was calendared in first position and called to trial, deprived Petitioner of his due process rights in violation of Amendment V to the Constitution of the United States of America.

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OPINION AND JUDGMENT BELOW

The Petitioner seeks review of a judgment on jury verdict on the sole ground that the trial court did not enter a pretrial order. The judgment which Petitioner seeks to review was entered by the trial court on May 10, 2000.

The affirmance by the Court of Appeals of the State of Georgia, cited as *Rolleston v. Estate of Sims*, 523 Ga. App. 182, 558 S.E. 2d 411 (2001), was appended to Petitioner's Brief as Supplemental Appendix B.

The order of the Court of Appeals of Georgia denying Petitioner's Motion for Reconsideration was entered January 10, 2002, and is appended to Petitioner's Brief as Petitioner's Supplemental Appendix B, p. 16a.

The order of the Supreme Court of Georgia denying Petitioner's Application for Writ of Certiorari, entered May 28, 2002, is appended to Petitioner's Brief as Appendix A.

GEORGIA STATUTE INVOLVED

O.C.G.A. § 9-11-16. Pretrial procedure; formulating issues; order; calendar

(a) Upon the motion of any party, or upon its own motion, the court shall direct the attorneys for the parties to appear before it for a conference to consider:

(1) The simplification of the issues;

(2) The necessity or desirability of amendments to the pleadings;

(3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

(4) The limitation of the number of expert witnesses; and

(5) Such other matters as may aid in the disposition of the action.

(b) The court shall make an order which recites the action taken at the conference and the agreements made by the parties as to any of the matters considered and which limits the issues for trial to those not disposed of by admissions or agreements of counsel. The order, when entered, controls the subsequent course of the action unless modified at the trial to prevent manifest injustice. The court, in its discretion, may establish by rule a pretrial calendar on which actions may be placed for consideration as provided in subsection (a) of this Code section and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions.

ERRORS AND OMISSIONS IN PETITIONER'S STATEMENT OF THE CASE

Petitioner has substantially misrepresented to this Court essential material facts in the underlying case and the state court appeals thereof, either by direct misstatement or by omission, the most blatant examples of which are set forth hereafter:

1. As noted by the Georgia Court of Appeals, Rolleston failed to provide any statement of the manner by which he preserved any

enumeration of error for appeal. [Petitioner's Supplemental Appendix, p. 7a].

2. Petitioner contends that the trial court's failure to issue a written pretrial order deprived Petitioner of statutorily defined rights. [Petitioner's Brief, p. 1]. However, he omits that the trial court did not enter such an order because it was brought on the day of trial after Petitioner failed to respond to Respondent's portion of the pretrial order served 6 days before trial. [Petitioner's Supplemental Appendix, p. 7a]. Further, as the Georgia Court of Appeals noted, ***"The [trial] court deemed Rolleston's proposed pretrial order inadequate and refused to bind the Estate to it, because Rolleston and the Trust refused to list their witnesses."*** [Petitioner's Supplemental Appendix, p. 7a].

3. The record of the underlying case clearly demonstrates that Petitioner failed to object when the trial court deemed Petitioner's portion of the pretrial order inadequate and refused to bind Respondent to such an inadequate submission.

4. The Petitioner failed to request a ruling on his motion for pretrial order from the trial court. Because Petitioner did not object and obtain a ruling on his motion for a pretrial order, he therefore cannot show error in the absence of a ruling. [*International Ass'n of Bridge, Structural & Ornamental Ironworkers, Local 387 v. Moore*, 149 Ga. App. 431, 454 S.E. 2d 438, 443 (1979)].

REASONS FOR DENYING PETITION FOR WRIT OF CERTIORARI

There are no compelling reasons for review of the lower state court's decision on writ of certiorari, and multiple reasons for denying the writ:

1. Petitioner cites no conflict with any decision of the United States court of appeals and a state court of last resort or any departure from the accepted and usual course of judicial proceeding so as to call for an exercise of this Court's supervisory power.

2. Petitioner cites no decision of a federal question by a state court of last resort that conflicts with another state court of last resort or of a United States court of appeals.

3. Petitioner cites no important question of federal law that has not been but should be settled by this Court, or that has been decided in a way that conflicts with relevant decisions of this Court.

4. Petitioner contends that the trial court misapplied a properly stated rule of law, but it is well-established that a writ of certiorari is rarely granted for such reason.

5. Finally, Petitioner failed to raise his constitutional challenge in the court of first instance, Fulton Superior Court. [Supplemental Appendix to Petitioner's Brief, p. 7a].

6. Petitioner further failed to raise any federal question in the Court of Appeals. [Supplemental Appendix to Petitioner's Brief, Appendix B, pp. 3a to 15a].

Therefore, no constitutional challenge is properly presented for review by this Court.

ARGUMENT

A. The Court Did Not Err in Proceeding With the Trial Without Entering a Pretrial Order Because There Was No Pretrial Conference.

Petitioner's sole basis for appeal to this Court is the alleged illegal and unconstitutional failure of the trial court to enter a pretrial order.

The statute cited by Petitioner as the exclusive basis for his claim that his Constitutional rights were violated, O.C.G.A. § 9-11-16, is a statute governing pretrial procedures in cases in which there is a pretrial conference. Under subsection (a) of that statute, the parties may request, or the trial court may, sua sponte, determine, that there be a pretrial conference. If, and only if, such a pretrial conference occurs, subsection (b) is applied to require that, under most circumstances, a pretrial order should then be entered. However, when no pretrial conference is held, there is no requirement to enter a pretrial order. [*Swanson v. State Farm Mutual Automobile Insurance Company*, 242 Ga. App. 616, 530 S.E. 2d 516 (2000)].

As the Court of Appeals correctly noted, "No pretrial conference was requested or held in this case; therefore, the court was not required to enter an order." [Supplemental Appendix of Petitioner's Brief, p. 7a].

B. In the Absence of a Ruling, There Is No Error for This Court to Review.

When the trial court refused to bind Respondent to Petitioner's inadequate submissions, produced after a recess granted to Petitioner to prepare and submit his portion of the pretrial order, Petitioner had the opportunity to insist upon a ruling and make an objection on the record in order to preserve this issue for appeal. It is well settled in Georgia law that Petitioner cannot demonstrate reversible error in the absence of a ruling. [*International Ass'n of Bridge Structural & Ornamental Ironworkers, Local 387 v. Moore,* 149 Ga. App. 431, 433, 454 S.E. 2d 438, 443 (1979)].

While Petitioner did make a motion for pretrial order, his request for a pretrial order on the day of trial was untimely. [*Kickasola v. Jim Wallace Oil Company,* 144 Ga. App. 758, 242 S.E. 2d 483 (1978)].

Even had the trial court interpreted Petitioner's request for a pretrial order as a request for a pretrial conference order, no error could be shown by the court's refusal because "It is not error to refuse a pretrial conference where the motion is untimely." [*Trustees of Trinity College v. Ferris,* 228 Ga. App. 476, 478(2), 49 S.E. 2d 909 (1977)].

C. This Court Lacks Jurisdiction to Consider a Constitutional Question Raised for the First Time in Petitioner's Application in the Supreme Court of Georgia for Writ of Certiorari.

It is black-letter law in Georgia from time immemorial that a constitutional question *must be raised in the first instance* to serve as ground for appeal in a higher court.

> *Jurisdiction is not vested in Supreme Court merely because it is contended that an action or judgment is or would be contrary to some constitutional provision of the Constitution. (Cite omitted) A constitutional question cannot be raised for the first time in the Supreme Court. Where it is sought to invoke a ruling by the Supreme Court on a constitutional question, the question must first have been raised in the trial court and a ruling made thereon and the case brought to the Supreme Court for review.* (Cites omitted) [*Aiken v. Richardson*, 207 Ga. 735, 64 S.E. 2d 54 (1951)].

The requirement of raising the constitutional question in the first instance as a condition precedent for review in a higher court is strictly respected by this court. Petitioner has failed to comply with Rule 14(g)(i) of this Court which requires him to specify

> ***the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; pertinent quotations of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears . . . , so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari. . . .***
>
> [Rule 14(g)(i) of the Rules of the Supreme Court of the United States].

Petitioner has utterly failed to cite any instance in which he raised federal issues in the trial or appellate

courts of Georgia, but has instead chosen to rely on the maxim "Brevity is precious" and utterly disregard the requirements of this Court's Rule 14(g)(i). The logical conclusion to be drawn from such failure is that Petitioner is unable to provide authority or record citations because none exist. Therefore, logic dictates that Petitioner's constitutional argument – which Petitioner failed to raise in either the trial court or the Georgia Court of Appeals – is fatally out of time and out of place and will not be considered.

To summarize, Petitioner cannot seek a writ of certiorari in this Court to review constitutional questions that were not raised in the trial court or the Court of Appeals of Georgia. However, even if this option were available to Petitioner, he has failed to set forth the elements of a constitutional challenge. Moreover, Petitioner cannot under any circumstances demonstrate the requisite discriminatory state action necessary to trigger constitutional safeguards. Petitioner's invocation of constitutional protection against his personal liability on a money judgment in favor of Respondent would be merely a dismal pleasantry were not the subject so serious and the damage to Respondent and its Decedent so extreme.

CONCLUSION

The decision of the Court of Appeals of Georgia is in accordance with the law of Georgia and the Constitutions of the State of Georgia and the United States. Petitioner has failed to show that he has been denied due process or even that the statutory laws of the State of Georgia were misapplied. Respondent Estate of Rebecca Wight Cherry

Sims submits that for these reasons stated above, the Petition of Moreton Rolleston, Jr., for Writ of Certiorari should be denied.

Respectfully submitted,

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Dated: October 18, 2002